STATUTORY CLAIMS – WHO NEEDS A LEGISLATURE

Chapter 6

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I. Introduction

Over the last decade or so, the Texas Supreme Court and the Texas Legislature have significantly refined (or some might say confused) the elements and scope of statutory claims available to insureds in suits against their insurers. At the same time, the Texas Supreme Court, as the final arbiter of the scope and application of common law causes of action, has examined the relationship, if any, between the evolving statutory causes of action and the common law "bad faith" claims that it has recognized. In so doing, depending upon your perspective, the combination of the Legislature's changes to the statutory provisions and the Texas Supreme Court's explanations of the common law claims has either brought greater uniformity and a more organized decisional matrix to this body of Texas insurance law or, instead, has confused the issues even further. This paper will briefly trace the history of Article 21.21 claims and discuss the Texas Supreme Court's view of the interplay between the statutory claims and common law clams, and point out some of the questions that still appear to be unaddressed.

II. A Historical Perspective

A. Pre *Vail*

Prior to the 1988 decision in *Vail,* it was widely believed that it was at least questionable whether Texas recognized a statutory private cause of action for unfair claims settlement practices. Indeed, it was the perceived lack of any statutory remedy for unfair claims settlement practices, among other things, that led the court to judicially adopt a *common law* duty of good faith and fair dealing for the insurer-insured relationship in *Arnold v. National County Mutual Fire Ins. Co.,* 725 S.W.2d 165, 167 (Tex. 1987) ("without such a cause of action insurers can arbitrarily deny coverage and delay payment of a claims with no more penalty than interest on the amount owed").

Old Art. 21.21, Section 16 nowhere expressed in the statute itself an intent to embrace *unfair claims settlement practices,* as opposed to misrepresentations and DTPA violations. While referencing Insurance Commission Board Orders, the Board Orders promulgated under Article 21.21 (primarily Bd. Order 18663, codified at 28 Tex. Admin. Code §21.3) did not deal with unfair settlement practices. Thus, as pointed out by Justice Gonzales, in *Vail*, there was "nothing in the legislative history of Section 17.50(a)(4) of the DTPA or Article 21.21. of the Texas Insurance Code to suggest that the legislature intended to provide a private cause of action for unfair claims settlement practices". *Vail,* 754 S.W.2d at 138 (Gonzales J. dissenting). Further, when the legislature enacted the Uniform Unfair Claims Settlement Practices Act as Article21.21-2 of the Insurance Code, it provided that the statute was only actionable by the State Board of Insurance. *Lone Star Life Ins. Co. v. Griffin,* 574 S.W.2d 576, 580 (Tex. App. -- Beaumont 1978, writ ref'd. n.r.e.); *McKnight v. Ideal Mutual Ins. Co.,* 534 F.Supp. 362, 364 (N.D. Tex. 1982). *CNA Ins. Co. v. Scheffey,* 828 S.W.2d 785, 791 (Tex. App. -- Texarkana 1992, writ denied); *Cantu v. Western Fire & Casualty Ins. Co.,* 716 S.W.2d 737, 741 (Tex. App. --

Corpus Christi 1986), *writ ref'd n.r.e. per curium,* 723 S.W.2d 668 (Tex. 1987). Further, the legislature specifically rejected a proposed amendment to Article 21.21., Section 16 in 1985 that would have created a private cause of action for unfair claims settlement practices as defined in Article 21.21-2. H.J. of TEX., 69th Leg., R.S. 417 (1985).

Not surprisingly, therefore, several courts, prior to *Vail,* rejected various types of suggested statutory private unfair claims settlement causes of action under Article 21.21. *Chitsey v. National Lloyds Ins. Co.,* 738 S.W.2d 641 (Tex. 1987) (rejecting suggested private cause of action under Article 21.21 for violations of Board Order 41454 since the Board Order required a "frequency" showing; rejecting cause of action under Board Order 18663, Section 4(b) alleging an *Arnold* violation as a practice "determined by law" since "determined by law" required at least a state agency, if not legislative, determination that a practice was unfair); *Lone Star Life Ins. Co. v. Griffin,* 574 S.W.2d 576 (Tex. App. -- Beaumont 1978, writ ref'd n.r.e.) (rejecting private cause of action for unfair claim settlement practices under Art. 21.21-2 since "this section, however, does not confer any private cause of action upon individuals insured by unfair settlement practices"); *Mobile County Mut. Ins. Co. v. Jewell,* 555 S.W.2d 903, 910-11 (Tex. Civ. App. -- El Paso 1977), *writ ref'd n.r.e., per curium,* 566 S.W.2d 295 (Tex. 1978) (limiting 21.21. cause of action to DTPA "laundry list").

B. *Vail*

The *Vail* majority, however, let none of this stand in its way of finding an implied private cause of action for unfair claims settlement practices under old Article 21.21 Section 16. In fact, the *Vail* majority, over the fairly caustic protestations against result oriented judicial activism by the dissents, recognized not one, but *three*, separate private unfair claims settlement practices statutory causes of action under old Article 21.21:

- Article 21.21 Section 16 incorporates Board Order 18663, Section 4(a)'s definition of unfair claims settlement practices as any practice "defined" in the Insurance Code or a rule or regulation issued by the State Board of Insurance pursuant to Article 21.21 as an unfair or deceptive act or practice; this in turn, selectively incorporates the "laundry list" of unfair claims settlement practices set forth in the non-privately actionable Article 21.21-2, Section 2(d), but, at the same time, selectively, does *not* incorporate the predicate "frequency" requirement under Article 21.21; (hereinafter referred to as "*Vail* cause of action #1");

- Article 21.21 Section 16 incorporates Board Order 18663, Section 4(b)'s definition of unfair claims settlement practices as including any practice "determined pursuant to law: as being an unfair deceptive act of practice; this, in turn, incorporates the "determination pursuant to law" made by the Texas Supreme Court in *Arnold* and *Aranda* that an insurer's breach of the duty of good faith and fair dealing is actionable; (hereinafter referred to as "*Vail* cause of action #2");

- Article 21.21 Section 16 makes privately actionable any defined violation of Section 17.46 of the DTPA; although none of the "laundry list" of prohibited acts under 17.46(b) even remotely purport to deal with unfair claims settlement practices, unfair claims settlement practices are an "unlisted" DTPA violation pursuant to Section 17.46(a) of the DTPA and, therefore, actionable under Article 21.21 (hereinafter referred to as "*Vail* cause of action #3").

C. The 1995 Amendments to Article 21.21

1995 Amendments to Article 21.21 Section 16 deleted conduct defined in rules or regulations adopted by the State Board of Insurance as a basis of private liability under Article 21.21 Section 16. At the same time, the Legislature enacted Sections 21.4 and 21.203 of the Texas Administrative Code as new privately actionable Sections 4 (10) and 4 (11) of Article 21.21 thereby making "unfair settlement practices" expressly privately actionable under Article 21.21 without go through the *Vail* gyrations. Those amendments expressly designated as an "unfair settlement practice":

> (a) engaging in any of the following unfair settlement practices with respect to a claim by an insured or beneficiary:
>
> ****
>
> (ii) failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurers liability has become reasonably clear.

III. *Garcia* – Ignoring Article 21.21 for Third-Party Claims

In *APIE v. Garcia*, 876 S.W.2d 842 (Tex. 1994) the issue was whether or not a *Stowers* claim was also a violation of old Article 21.21 or the DTPA. Of course, *Garcia* addressed this issue in the context of Article 21.21 prior to the 1995 amendments. Plaintiffs in *Garcia* argued that if unfair claim settlement practices were actionable under the pre-1995 version of Article 21.21 through the various board orders, per the holding in *Vail*, there was no reason to limit *Vail* to unfair settlement practices in the first party context. But in *Garcia,* a majority of the Texas Supreme Court disagreed and specifically held that "breach of the *Stowers* duty does not constitute a violation of Article 21.21 or the DTPA". *Id.* at 847. The court distinguished *Vail* as limited to the first party context. *Id.,* n.10. Somewhat surprisingly, even the dissenting justices, Hightower and Doggett, did not directly attack the majority holding on that front, i.e. that the majority was ignoring language of a legislative enactment (at least as far as the legislative enactment had been interpreted to confer a cause of action by *Vail*). Instead, the dissenting justices argued that the underlying facts involved more than a simple refusal to settle.

The *Garcia* court stated:

> Although Garcia argues that this case is not solely a *Stowers* lawsuit because the remedies under the Deceptive Trade Practices Act and Tex. Ins. Code Art. 21.21 are cumulative remedies, and the judgment below is couched in terms of a violation of Article 21.21, all of the jury issues that formed the basis for the judgment against APIE in the *Stowers* case involved the breach of either the duty to defend or the duty to settle the malpractice lawsuit. Breach of the *Stowers* duty does not constitute a violation of Article 21.21 of the DTPA.

Garcia, 876 S.W.2d at 847. (emphasis added).

In the footnotes accompanying this statement, the *Garcia* court took on *Vail*:

> Garcia contends that *Vail v. Texas Farm Bureau of Mutual Ins. Co.,* 754 S.W.2d 129 (Tex. 1998) and *Allstate In. Co. v. Kelly,* 680 S.W.2d 129 (Tex. App. -- Tyler 1984, writ ref'd. n.r.e.) support his contention that jury failure to settle involves an unfair or deceptive practice under Article 21.21 [i.e. *Vail* caused of action #2 and 3]. *Vail,* however, involved an insurer's bad faith refusal to pay a claim under a first party property insurance policy. *Vail,* 754 S.W.2d at 130. A *Stowers* action, by definition, involves an insurer's duty to settle a covered lawsuit – a situation that can only arise under a third party liability insurance policy. Thus, *Vail* is inapposite.

Garcia, 876 S.W.2d at 847, n. 10.

In effect, *Garcia* stood for the proposition that the statutory cause of action recognized in *Vail* under old Article 21.21 for unfair claim settlement practices was limited to first party insurance claims simply because first party insurance claims are different than third party insurance claims and do not involve a long standing well recognized common law created cause of action like *Stowers*. The *Garcia* majority did not explain, however, why the fact that a third party failure to settle claim is a *Stowers* claim necessarily means that the same facts cannot also be actionable under a separate statutory enactment, particularly where the Texas Supreme Court had specifically construed that statutory enactment in *Vail* to regulate unfair claim settlement practices.

IV. *Giles* – The Merger of Article 21.21 and First Party "Bad Faith" Claims

At the same time, the Texas Supreme Court was struggling with how to review a finding of a common law breach of the duty of good faith and fair dealing claim under the "no evidence" standard of appellate review in light of its holdings in *Arnold* and *Aranda* said that an insurer only breaches its duty of good faith and fair dealing when "the insurer had no reasonable basis for denying or delaying payment of a claim and the insurer knew or should have known that fact". *Aranda v. Ins. Co. of North America*, 748 S.W.2d 210, 213 (Tex. 1988). This issue came to a head in the Texas Supreme Court's 1997 decision in *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). The problem, as noted by the Court, was that the Plaintiff in a common law bad faith case, under the previously annunciated standard, must prove the absence of a reasonable basis to deny the claim, which is a negative proposition, but yet, under the "no evidence" standard of appellate evidentiary review, an appellate court must resolve all conflicts in the evidence and draw all inferences in favor of the jury's "bad faith" finding. *Giles*, 950 S.W.2d at 51.

In stark contrast to the court's approach in *Garcia,* treating common law and statutory claims as difference animals, the *Giles*' majority looked to the legislature's 1995, then recent, amendments to Article 21.21 Section 4 and noted that Article 21.21 now defined "unfair settlement practices" to include "failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear". *Id.* at 55. The court conceded that Article 21.21 Section 4 (10) did not, by its own terms, govern common law bad faith actions, but concluded that the standard that it established will prove "workable in all actions". The court also noted the perceived advantage of requiring a bad faith claimant to prove that a carrier failed to attempt to effectuate a settlement after its liability "has become reasonably clear" that would eliminate the conflict with the "no evidence" of appellate review and that, perhaps more significantly, adopting the statutory standard as also defining the parameters of the common law claim "unifies the common law and statutory standards for bad faith" and would "allow for a factual inquiry that trial courts can easily and intelligently craft into a jury charge." *Id.*

Justices Hect, Phillips, Gonzales and Owen, concurring, agreed that merging the statutory standard into the common law cause of action "simplifies the law" but "did nothing to clarify what bad faith means or resolve the dilemma of evidentiary review". *Id.* at 59.

The Texas Supreme Court, as the final arbiter of the elements and scope of Texas common law claims, can hardly be criticized for deciding to make the common law claim co-extensive with the legislatively created statutory claim. After all, it is the Texas Supreme Court that recognizes or creates common law claims to begin with. Therefore, it is within the province of the judiciary to refine, modify or even abrogate the common law causes of action it created.

V. *Rocor* – Revival of the Article 21.21 Claim in the Third-Party Context

Garcia appeared to have settled the issue of the lack of any Article 21.21 claim in the third-party context. Until *Rocor Intl., Inc. v. National Union Fire Ins.*, 77 S. W.3d 253 (Tex. 2000).

The issue in *Rocor* was whether old Article 21.21, *as it existed prior to the September 1, 1995 amendments*, affords the insured a cause of action for unfair claims settlement practices in the third-party liability context. That sounds a lot like the same issued decided in *Garcia*. Specifically, the issue was whether the insured had a cause of action under Article 21.21 for costs that the insured incurred in defending a lawsuit while the excess carrier delayed settling the claim. There was no excess judgment. As noted, the issue was simply the insured's additional defense costs and expenses incurred due to the carrier's alleged delay in getting the case settled.

As already discussed, prior to the 1995 amendments, Article 21.21 §16(a), as construed in *Vail* allowed insureds to bring claims under Article 21.21 through the State Board of Insurance board orders, which in turn, allowed the insured to bring claims under other sections of the insurance code, including Article 21.21-2. Article 21.21-2 defined as an unfair practice "not attempting in good faith to effectuate prompt, fair and equitable settlements of claim submitted in which liability has become reasonably clear". See Article 21.21-2, §2(b)(4). Although Article 21.21-2 does not itself give rise to a private cause of action, the Texas Supreme held in *Vail* that conduct violating Article 21.21-2 was actionable under Article 21.21 through Board Order 18663.

Not surprisingly, National Union relied upon the language in *Garcia* holding that an insured has no cause of action under Article 21.21 for the insurer's fail to settle a third-party claim. In *Garcia* the court held that breach of the *Stowers* duty did not constitute a violation of Article 21.21. Moreover that the *Garcia* court distinguished *Vail* because *Vail* involved a first-party property insurance claim. In *Rocor*, the Texas Supreme Court, in effect, repudiates those statements. The *Rocor* court held that nothing in Article 21.21 supports a conclusion that the legislature intended the limit Article 21.21 the first-party claims when the insured has sustained actual damages.

The court then turned to defining the applicable standard to be applied. *Rocor* holds that, in order to trigger an insurer's statutory duty to reasonably attempt settlement of a third-party claim against its insured, the policy must cover the claim and the insured's liability to the third-party must be reasonably clear. Additionally, as with a common law *Stowers* claim, the claimant must have made a proper settlement demand within policy limits such that an ordinarily prudent insurer would have accepted it. If these elements are met, then the insured has a cause of action for unfair claims settlement practices in the third-party liability context, even if there has not been any excess judgment, provided that the insured can prove that the insurer's conduct caused the insured to suffer damages.

The importance of the fact that *Rocor* was dealing with the pre-1995 version of Article 21.21 and the *Vail* scheme there under cannot be over emphasized. As the *Rocor* court pointed out in footnote three to its opinion, Article 21.21 was amended in 1995 to specifically make certain unfair claim settlement practices directly actionable under Article 21.21 itself without having to resort to the lengths that the *Vail* court went to in order to get to the non-privately actionable violations under Article 21.21¬2. Article 21.21, §4 now defines unfair settlement practices as including:

> (ii) failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear. (emphasis added).

Note that in *Rocor*, in dealing with the pre-1995 version of Article 21.21 where the standard was settlement of claims "in which liability has become reasonably clear", the *Rocor* court construed the reference to "reasonably clear" liability to refer to the insured's liability. However, under the current version of Article 21.21, by the statute's own terns, it is not the insured's liability that must be clear, but is instead the insurer's liability. So, one would expect that in applying *Rocor* to a case governed by the 1995 amendments to Article 21.21, courts would address the fact that, under the 1995 amendment, the insurer's liability must be clear rather than the insured's liability being clear.

VI. Post *Rocor* – Some Courts Have Ignored the Effect of the 1995 Amendments to Article 21.21

Gulf Ins. Co. v. Jones, 2003 WL 22208551 (N.D. Tex. 2003) follows up on *Rocor* and purports to apply it.

The underlying claim was a medical malpractice case against a podiatrist, Bloom. Gulf defended Bloom in the lawsuit. It was tried and the jury returned a verdict in favor of the Plaintiff for $2,125,000. After remittitur, judgment was entered in favor of the Plaintiff against Bloom for $1,100,000 plus pre-judgment and post-judgment interest.

Gulf contended that its coverage was limited to the "per person" policy limit of $500,000 plus post-judgment interest on that amount. On March 27, 2000, Gulf paid the Plaintiff the $500,000 per person limit plus post-judgment interest on that amount through the date of payment. Gulf then filed the present declaratory action seeking a ruling that it had no duty to indemnify its insured further and that it had no extra-contractual liability under *Stowers*. The insured and the Plaintiff filed counterclaims for breach of contract, negligence, *Stowers* violations and violations of the Insurance Code.

On June 27, 2001, the Plaintiff and the doctor settled their differences and entered into an agreement whereby the doctor agreed to pay the Plaintiff $200,000 in exchange for the Plaintiffs agreement to only seek satisfaction of the remaining amount owed on the judgment from Gulf and from the proceeds of a malpractice case that the insured

intended to bring against his defense lawyers. The insured specifically alleged that defense counsel failed to properly evaluate and settle the lawsuit within the policy limits and failed to inform him of his rights and the consequences of failing to settle within limits.

As to the common law *Stowers* claim, it was undisputed that there had been a pre-trial settlement demand for the $500,000 per person policy limits. However, when the insured was informed of the offer, he stated that he did not want to settle the case even though the policy did not require that the doctor give his consent to settle. The insured was also advised of his rights to hire personal counsel but did not do so. The settlement offer was refused. Nonetheless, the insured contended that Gulf's adjustor was negligent by not fully appreciating the weaknesses in the defense. The court pointed out, however, that the evidence showed that the claims adjustor was aware of and considered the possible exposure in the case including the opinions of the Plaintiffs and defense experts. The insured had testified in deposition that he thought it was reasonable for the insurance company to believe that the case was defensible.

Second, the insured contended that the claim adjustor erred by mistakenly concluding that she needed his consent to settle. The court pointed out that the insured was adamant that he did not want to settle and communicated his position in that regard to Gulf. The evidence showed that Gulf did not believe that the lawsuit was worth the policy limits and, therefore, Gulf would not have settled even if it had known that the insured did not have to consent. The court points out that the insurer has no *Stowers* obligation to make or solicit settlement offers. Based on all of the facts, the court held that Gulf was entitled to summary judgment on the *Stowers* claim.

With regard to the Article 21.21 claims, Gulf, argued that the insured had no statutory bad faith claims for failing to settle beyond the common law *Stowers* claim. However, the court noted that, Article 21.21 had been amended to include §4(10) which permits an insured to bring a claim against its insurer for "failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear". Then, the court cites *Rocor's* discussion of the elements of a statutory failure to settle claim even though *Rocor* was construing the pre-1995 version of Article 21.21 which did not include §4(10) and which merely spoke in terms of a claim on which "liability was clear". The court specifically acknowledged that the opinion in *Rocor* did not purport to interpret §4(10) but characterized the pre-1995 language "virtually identical" to the language in §4(l0). Since there was no valid *Stowers* claim, and *Rocor* had adopted the *Stowers* elements as the elements of an Article 21.21 claim, at least under the pre-1995 statute, the court held that the insured had no cause of action under the post-1995 version of Article 21.21.

In this case, the difference in the pre-1995 statutory language construed in *Rocor* and the post-1995 amended language of Article 21.21 made no difference in the end since the court found that the insured had no viable *Stowers* claim. It is significant, however, that the court treats the old language as construed by *Rocor* to be "virtually identical" to the language to the post-1995 statute involved here.

Travelers v. Page, 2002 WL 1371065 (Tex. App.--Amarillo 2002) discusses extra-contractual damages under Article 21.21 and the DTP A and arises out of an underlying construction defect dispute.

In January 1989, the owners of the project notified the insured, the general contractor, and its surety company of the alleged defects in the project and alleged that the insured had breached its contract that the owners intended to file suit. The insured promptly notified three insurance carriers of the demand letter but did not demand coverage or a defense under the policies at that time.

The owners filed suit in New Mexico against the insured and its surety company on June 12, 1989 alleging breach of contract. The insured failed to provide Travelers with the petition or request a defense, however, until May 1990. On October 12, 1990, Travelers agreed to assume the insured's defense under reservation of rights. Eventually, on March 11, 1992, the insured, the owners, and the bonding company settled. The bonding company paid $950,000 to the owners. In turn, the bonding company sought $1,092,000 in reimbursement from the insured. In a letter dated June 17, 1992, the insured demanded that Travelers and two other carriers reimburse the insured for the full amount sought by the bonding company, as well as $158,000 in incurred defense costs. Travelers rejected this request, contending that there was no coverage under its policies because there was no property damage within the policy period. It also declined to pay additional defense costs because it contended that they were incurred before it was notified of the suit.

In July 6, 1992 the insureds filed suit against Travelers and two other carriers, Maryland Casualty and Employer's Casualty, in Potter County seeking a declaration that the policies provided coverage and asserting causes of action for breach of contract, breach of the duty of good faith and fair dealing, negligence and violations of Article 21.21 and the DTPA.

Employer's Casualty was then put into receivership and had minimal further involvement in the litigation. On October 27, 1992, Maryland settled with the insured for $250,000, $150,000 to be paid to the insured and Safeco to settle coverage claims and $100,000 to the insured and Safeco for extra-contractual claims.

The insured moved for summary judgment against Travelers the issue of coverage and breach of contract. Travelers responded by asserting late notice, lack of coverage and various other exclusions and affirmative defenses. Travelers also filed its own motion for summary judgment.

The trial court denied Travelers' motion and granted the insured's motion for partial summary judgment, holding that Travelers had a duty to defend the insured and that the policy provided coverage for the property damage but did not cover the cost of repairing certain faulty construction. The trial court found that there were questions of

fact on the issue of damages and reserved those issues for trial. The court also then severed the extra-contractual claims.

Then, at the trial on damages, the court rendered judgment in favor of the insured for breach of contract, awarding $907,000 in actual damages $250,000 in pre-judgment and interest and $170,000 in attorney's fees. That judgment was appealed and the Court of Appeals reversed and rendered judgment for $50,000 in loss of use damages and $62,246 in defense costs plus attorney's fees and interest.

Then, trial proceeded on the extra-contractual claims resulting in a judgment adverse to Travelers finding that it had violated the DTPA and Article 21.21. Specifically, the trial court found that Travelers had:

- Represented that its insurance contract involved obligations which it did not have or involved;
- Represented its insurance services had characteristics or benefits which they did not have;
- Made statements misrepresenting the terms, benefits or advantages of the policies;
- Made assertions, representations or statements with respect to the insurance that were untrue, deceptive or misleading;
- Made misrepresentations relating to its insurance policy by making untrue statements of material fact, failing to state material facts that were necessary to make other statements not misleading and making statements in such a manner as to mislead a reasonably prudent person to a false conclusion.

Additionally, the trial court found that Travelers did not attempt in good faith to effectuate prompt, fair and equitable settlements of claims submitted to which liability had become reasonably clear in violation of Article 21.21, failed within a reasonable time to affirm or deny coverage of the claim in violation of Article 21.21, and refused to pay a claim without conducting a reasonable investigation in violation of Article 21.21.

In reviewing these findings, the Court of Appeals characterized the gist of the insured's complaint as Travelers asserting that there was no coverage under the policy when they knew there was coverage for loss of use of the premises, even though the loss of use may have occurred well after the policy, and by continuing to deny that coverage, Travelers delayed payment of defense costs, refused to pay costs that it represented that it would pay and otherwise refused to assist its insured in the defense of the case. Travelers' basic argument in response was that there was a bone fide dispute about coverage under its policy, and that the alleged misrepresentations complained of were nothing more than Travelers interpreting its policy one way and the insured interpreting a different way.

The Court of Appeals first considered whether a bone fide dispute on coverage defense applied and if it did, did Travelers denial of coverage arose from a bone fide dispute as to the insurance coverage or as the result of deliberate of misrepresentations or conscious indifference. The court held the bone fide dispute defense applied and that it was not until the court's decision in the coverage suit that Travelers actually knew that the loss of use occurring outside its policy period was covered. The alleged misrepresentations were nothing more than a coverage dispute.

The Court of Appeals reversed and rendered that the insured take nothing on its extra-contractual claims.

Chickasha v. Houston General Ins., 2002 WL 1792467 (Tex. App. -Dallas 2002) deals directly with the *Rocor* court's analysis of the pre-1995 Article 21.21 versus the post-l 995 Article 21.21 §4(10) language.

Chickasha was sued by hundreds of claimants for air, ground and water pollution in Commerce Texas. The suits were filed in various counties, and implicated Chickasha's coverage from 1946 to 1986. Chickasha contacted all of the carriers it could find and tendered the cases to them for defense. Chickasha could not find any policies before 1972. Chickasha's carriers after 1972 denied coverage. Chickasha sued for declaratory judgment that the policies covered claims. Additionally, Chickasha brought claims for breach of the duty of good and fair dealing and violations of Article 21.21. As of October 1, 1999 Chickasha had spent more than $7,000,000 in defense costs and settlement of the underlying claims.

The first issue was whether Chickasha had adequately proven the existence of and the terms of pre-1972 insurance policies. The court, in an interesting discussion of the proof and evidence problems when old polices cannot be found, concluded that the evidence established the existence of and coverage under pre-1972 policies. The court upheld the trial court's summary judgment on that point.

Next, the Court of Appeals addressed the trial court's summary judgment in favor of the carrier on the extra-contractual claims. Claims were asserted under Article 21.21 §4(10). Since Chickasha's suit was filed in 1998, the post-1995 Article 21.21 applied. The court addresses *Rocor* and states that the pre-1995 language that the *Rocor* court interpreted is "virtually identical" to the language in §4(10)(ii). The court completely fails to even note any distinction between the insured's liability to the third-party claimant being clear, which was the standard applied by the *Rocor* court under the pre-1995 language, and the insurer's liability being clear, which is the language of the post-1995 Article 21.21. The Chickasha court holds simply that the elements of the cause of action as set out in *Rocor* are applicable to a cause of action under §4(l0)(ii).

Then, the court addresses the carriers' argument that the insurer's liability was not clear because coverage for the underlying claims was not "reasonably clear". The court dismisses this argument out of hand with the following statement:

> "Reasonable clarity of coverage is not one of the elements under *Rocor* and §4(10)(ii).

However, the court also noted that the carriers did not include this particular argument in their motion for summary judgment, and, therefore, assert it for the first time on appeal. The summary judgment for the carriers was reversed.

This case is significant in that the court applied the *Rocor* elements blindly to the post-1995 Article 21.21 language and even went so far as to specifically state that clarity of coverage is not one of the elements even though the post-1995 language requires that the insurer's liability be clear.

VII. A Final Issue-Policy Benefits as Statutory Damages

The most common actual damages are the policy benefits themselves. In certain cases under the Insurance Code, the amount of policy benefits wrongfully withheld is an element of damages caused by the defendant's conduct, as a matter of law. *Vail v. Texas Farm Bur. Mut. Ins. Co.,* 754 S.W.2d 129, 136 (Tex. 1988). The Supreme Court in *Vail* rejected the insurer's argument that damages for an unfair settlement practice had to be something more than the amounts due under the policy. The court held that damages for a wrongful refusal to pay are at least equal to the policy benefits, as a matter of law. The court reasoned:

> The fact that the Vails have a breach of contract action against Texas Farm does not preclude a cause of action under the DTPA and Article 21.21 of the Insurance Code. Both the DTPA and the Insurance Code provide that the statutory remedies are cumulative of other remedies...It is well settled that persons without insurance are allowed to recover based on false representations of coverage...and that an insurer may be liable for damages to the insured for its refusal or failure to settle third-party claims...It would be incongruous to bar an insured – who has paid premiums and is entitled to protection under the policy – from recovering damages when the insurer wrongfully refuses to pay a valid claim. Such a result would be in contravention of the remedial purposed of the DTPA and the Insurance Code. *Vail v. Texas Farm Bur. Mut. Ins. Co.,* 754 S.W.2d 129, 136 (Tex. 1988)

Nevertheless, courts construing this language from *Vail* have concluded that policy benefits are not always damages as a matter of law. In *Twin City Fire Ins. Co., v, Davis*, 904 S.W.2d 663 (Tex. 1995), the court held that policy benefits could not serve as independent tort damages resulting from the insurer's breach of its duty of good faith and fair dealing, which were necessary to support exemplary damages. Other cases have also

concluded that policy benefits are not necessarily damages as a matter of law. *See Seneca Resources Corp. v. Marsh & McLennan, Inc.*, 911 S.W.2d 144 (Tex. App. – Houston [1st Dist.] 1995, no writ); *Beaston v. State Farm Life Ins. Co.*, 861 S.W.2d 268 (Tex. App. – Austin 1993), *rev'd on other grounds,* 907 S.W.2d 430 (Tex. 1995). When in doubt, the better approach is to plead, prove, and get a jury finding on policy benefits as damages.

VIII. Some Interesting Issues

1. Does the *Rocor* standard apply to the post-1995 amendments to Article 21.21 which speak in terms of the insurer's liability being clear versus *Rocor*'s interpretation of the pre-1995 statute as calling for the insured's liability to the third-party being clear?

2. What if the insured's liability to the third-party is clear but there are serious unresolved coverage questions thereby making the insurer's liability unclear? Under the current version of Article 21.21, a literal reading of the statute would require that not only must the insured's liability to the claimant be clear, but the insurer's coverage obligation must also be clear. Otherwise, the insurer's liability is not clear, which is what the current version of the statute requires.

3. If a legitimate coverage dispute is a defense to a statutory *Stowers* claim under *Rocor*, is it also a defense to a pure common law *Stowers* claim?

4. What impact will *Franks Casing* have on all of this?